N0. 92-1475

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

I.M.T.C., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the National Labor Relations Board exceeded its authority by deviating from established precedent when it ordered Petitioner to hold craft specific elections, where the employer utilizes its employees without regard to craft lines and the petitioned-for bargaining units do not constitute clearly identifiable and functionally distinct groups of employees.

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INTEREST OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Associated Builders and Contractors, Inc. (herein "ABC") is a national trade association representing approximately 16,000 construction and construction related firms located in 79 chapters throughout the country, including the Petitioner. ABC's diverse membership is bound by a shared commitment to the "merit shop" philosophy of awarding construction contracts to the lowest responsible bidder. An integral part of that philosophy is the rejection of organizing a workforce along strict craft jurisdictional lines. Rather, our members share the belief that the freedom to assign employees across traditional craft

lines, as dictated by the needs of a particular job, is essential to the efficient delivery of construction services. Indeed, this is one of the distinguishing features of the "merit shop" approach.

Consistent with this philosophy, ABC provides its members access to a training program, in order to diversify the skills of their employees. Although the training program is divided into different skill areas for the sake of practical and organizational convenience, this is no way implies an endorsement of the traditional craft distinctions in job assignments. Rather one of the purposes of the training program is precisely the opposite — to enable employees to cross-train in areas other than their dominant skill. As such, the purpose of the training program is entirely consistent with the philosophy of utilizing employees without regard to craft distinctions as the most efficient means to complete a construction project.

STATEMENT OF THE CASE

ABC adopts the statement of the case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

A. The Board's Unit Determination, As Enforced By The Court Of Appeals, Is At Odds With Established Board Precedent And Represents A Radical Departure From Its Previous Policy.

The law is well-settled that where the Board departs from established precedent, but fails to provide a reasonable explanation for the departure, it is not given the traditional deference in making unit determinations and, in such cases, the Board's order will not be enforced. *See, e.g., NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196-97 (1941); *Amoco Productions Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980). In the present case, the Board has failed to adequately explain why it ordered separate craft elec-

tions, in contrast to its own clear past precedent, where a construction employer's employees share common supervision and work assignments, receive identical rates of pay, have daily contact across craft lines, work side by side, and enjoy identical fringe benefits and training. While the Board has long recognized that in the construction industry units may be appropriate on the basis of craft, or because they comprise a clearly identifiable and functionally distinct group of employees, the petitioned-for employees in this case meet neither of these tests. Consequently, the Board's decision in this case was not supported by substantial evidence in light of the controlling legal principles and the Court of Appeal's enforcement of that order was, therefore, clearly erroneous.

The facts of the present case are nearly identical to those found in *Brown and Root, Inc.*, 258 NLRB 1002 (1981), in which the union attempted to carve out a "craft" unit consisting of pipefitters, pipe welders, boilermakers, boiler welders, pipefitter helpers and boilermaker helpers from the employer's overall construction workforce. The Board determined that these classifications of workers did not have a sufficient community of interest distinct from the other construction workers so as to merit a separate bargaining unit. Instead, the Board accepted the employer's position that its operation was integrated to the extent that one overall unit was appropriate for collective bargaining purposes.

The Board reached this decision by analyzing the traditional "community of interest" criteria to determine that an overall unit was appropriate, rather than a unit consisting of a few classifications artificially carved out from the overall workforce. The Board noted, *inter alia*, that all the employees were paid on an hourly basis and were eligible for identical fringe benefits. Further, all employees were covered by the same work and safety rules. Moreover, all employees were eligible for upgrading or cross-training programs, although they did not receive

journeyman status in a particular craft.[1] Finally, the Board determined in *Brown & Root* that the union's requested unit was inappropriate due to the employer's use of composite crews, which included individuals with pipefitter skills working on crews which included crane operators, riggers, structural ironworkers and helpers, who were not limited to assisting only pipefitters and boilermakers.

Of particular importance was the testimony of the employer's vice-president, who explained that while job classifications such as "pipefitter" and "boilermaker" were used to distinguish employees, the employer did not strictly follow such traditional jurisdictional lines when assigning work. Rather, the testimony established, as in the instant case, that employees in various job classifications worked together to do whatever was necessary to complete a particular project. As the Board stated, "the Employer assigns and utilizes its employees according to its needs rather than following strict jurisdictional or craft lines." *Id.* at 1003.[2]

Thus, in *Brown & Root*, the Board considered and rejected the union's argument on facts nearly identical to those of the present case. The union's position was rejected even though the employer had organized its workforce into departments which

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[1] This is very similar to Petitioner's participation in ABC's training program. In this regard, the testimony is uncontradicted that the training provided by the ABC program was designed to allow Petitioner's employees to acquire skills in order to function in any number of classifications. In addition, as in the instant case, the employer in *Brown & Root* administered welding tests to its employees without regard to job classification.

[2] In *Brown & Root*, the Board also noted that the requested unit included helpers assigned to pipefitters and boilermakers. The Board commented that it would be inappropriate to create such a unit where helpers were not assigned by craft, but were available to all skilled workers. This is precisely the situation in the present case. All of Petitioner's helpers are part of the composite crews and are expected to assist all of the mechanics in moving a project to completion.

included a pipefitting department, a boilermaker department, a millwright department, etc. Moreover, individuals with different skills were further distinguished by wearing different colored hard hats (e.g., pipefitters wore green hard hats, while boilermakers wore gray hard hats). The Board looked beyond the surface appearance of distinct craft lines, however, and applied its traditional community of interest standard to determine that one overall unit was appropriate.

The holding in *Brown & Root* was reaffirmed in *Longcrier Co.*, 277 NLRB 570 (1985), in which the Board determined that a unit of operating engineers was inappropriate in a situation in which a composite crew method was utilized by an employer who also employed individuals classified as carpenters and laborers. The rationale of the decision was that the petitioned-for unit did not consist of a clearly identifiable and functionally distinct group of employees. The Board noted that the operators did not participate in, or complete, a traditional apprenticeship training program or achieve journeyman status in the operating engineer craft. The Board ruled that it would be inappropriate for a unit to be carved out to include only those employees "who happen to spend a majority of their time operating some type of construction equipment." *Id.* at 572.

The Board further noted that the more compelling factors which favored an overall bargaining unit included the common supervision under which all classifications of employees worked and the functional integration of the work performed by the operators, carpenters and laborers. Moreover, the crew supervisors utilized employees "according to need rather than following strict job classifications . . . [T]hose project employees who operate construction equipment also perform other tasks and work with other employees as an integrated team" *Id.*

For all these reasons, which are also present in the instant case, the Board determined that an overall unit was appropriate. *See also A.C. Pavement Stripping Co., Inc.*, 296 NLRB 206

(1989) (overall unit appropriate, despite several job classifications, where all employees worked under common supervision and performed tasks without regard to craft jurisdictional lines); *accord S.J. Groves & Sons Co.*, 267 NLRB 175 (1983).

Thus, because the Board's decision in this case is an unwarranted and unexplained departure from its established precedent regarding the appropriateness of unit determinations, the Fifth Circuit's decision to enforce the Board's order must be reversed.

B. The Board's Decision Threatens To Undermine The Stability of Multi-Craft Labor Relations In The Construction Industry.

Not only is the Board's decision in this case clearly contrary to its established precedent, as outlined above, but it also threatens, as Petitioner points out, to undermine the stability of labor relations on any project which utilizes employees across craft lines. Further, the decision will have a deleterious effect the NLRB electoral process throughout the construction industry.

It has been long recognized that the designation of artificially small bargaining units, which exclude employees with common skills, attitudes and economic interests may unnecessarily generate factionization and in-fighting among employees. *See NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980).[3] The potential for conflict will be compounded in this case, where the employer uses small, functionally integrated work crews, which will potentially be made up of both union and non-union employees, subject to different terms and conditions of employment.

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[3] Indeed, this is the rationale behind the "community of interest" standard, under which the Board and the courts have traditionally looked to factors such as "bargaining history, operational integration, geographic proximity, common supervision, similarity in job function and degree of employee interchange." *NLRB v. J.C. Penney Co.*, 559 F.2d 373, 375 (5th Cir. 1977).

In this regard, the Board's reliance on the existence of the ABC training program to justify the imposition of craft- specific bargaining units is particularly inappropriate, as it ignores the reality of multi-craft training in the non-union sector of the construction industry. Far from supporting rigid craft lines, the purpose of ABC's training program, in part, is to encourage cross-craft diversity, which results in the more efficient delivery of construction services. One side effect of cross-craft training is that it militates in favor of a company-wide community of interests because it creates a more integrated and unified work force. The Board's decision in this case threatens to destroy the advantages of this approach to labor relations.

Further, the Board's decision to carve out craft specific units from within an integrated workforce will vastly complicate the electoral process where employees are utilized across craft lines, as demonstrated by the facts of this case. As Petitioner points out, given the fact that IMTC's employees perform a variety of craft skills, it was, and will be, be extremely burdensome to identify which unit is appropriate from each individual employee. In addition, there will inevitably arise jurisdictional disputes among competing unions. All of these factors will complicate the electoral process, to the detriment of employees and management alike.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the Petition for Writ of Certiorari, ABC urges the Court to review the decision of the Fifth Circuit in this case.

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